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In The
Supreme Court of the United States

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,
Appellees.

MOTION TO DISMISS

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JANUARY, 1959.

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In The
Supreme Court of the United States

No. 576

W. E. ANDERSON,
Appellant,

VERSUS

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA and KENNETH A. ELLISON,
Appellees.

MOTION TO DISMISS

Now comes the appellees, The Corporation Commission of Oklahoma and Kenneth A. Ellison, and move to dismiss the appeal herein on the grounds that:

1. The appeal does not present a substantial Federal question.

2. The judgment rests on an adequate non-Federal basis, all as appears in the statement of grounds making against the jurisdiction of this Court filed herewith.

STATEMENT OF MATERIAL FACTS

Under date of July 29, 1953, the Corporation Commission of the State of Oklahoma, acting under the authority in sub-sections (a) and (b) Sec. 87.1 of Title 52 O. S. A. and on an application filed by Sinclair Oil and Gas Company, entered its order establishing 80 acre drilling and spacing units for the production of oil and gas from the Bromide Sand Section of the Simpson Formation in an area, including the lands in question. The drilling and spacing units were formed by dividing each governmental quarter section into two rectangular units by a line East and West through the center thereof. The order further prescribed the location of the permitted wells in each unit (R. 29). It further provided that if the owners of an undivided interest within any unit so established were unable to agree on a plan for development, their rights and equities should be adjudicated by the Corporation Commission as provided by 52 Oklahoma Statutes Annotated, Sec. 87.1 (d).

On March 17, 1955, the appellee, owning leasehold interests within the unit described as the N/2 SW/4 of Section 18, Township 5 North, Range 4 West, filed an application before the Corporation Commission, reciting that he desired to drill a well on the unit and had made arrangements with all the other owners of leasehold interests in the unit except W. E. Anderson, the appellant herein, who owned what later was determined to be

18.48 per cent of the minerals within the unit. The application recited the estimated cost of the well to be drilled and prayed the Commission upon a hearing, after notice as provided by law, to establish the rights of the parties in respect to sharing the production, the cost of obtaining such production from the drilling and spacing unit, and to prescribe such other terms and conditions as might appear just, equitable and necessary (R. 17 and 18).

On March 26, 1955, W. E. Anderson, appellant herein, filed his response to the application, indicating that he did not desire to participate in the drilling of a well on the premises and that an order which conferred on applicant any rights greater than a reimbursement out of respondent's share of the production would be contrary to the applicable State statutes and to the Constitution of the State of Oklahoma (R. 23 and 24).

The matter was heard before the trial examiner for the Commission on April 1, 1955, the applicant showing among other things, that he had tried to get other owners in the unit to drill the well (R. 48); that he had made considerable effort to persuade the appellant herein to participate in the well (R. 34) and that he had a drilling obligation by virtue of the completion of a well in the unit offsetting the lands in question (R. 35). The appellant appeared before the trial examiner (R. 56). The trial examiner reported his findings to the Commission on April 4, 1955.

Thereafter, on April 11, 1955, the appellant filed his exceptions to the report of the trial examiner (R. 63-66), which exceptions were heard by the Commission. At that hearing appellant took the position that the drilling of the well involved little risk; that it was a cinch producer, and that the Commission had set the lease bonus in lieu of participation at too low a figure (R. 66A-66B).

On May 16, 1955 the appellant herein filed a motion for rehearing, requesting the Corporation Commission to reconsider and vacate its order and at the same time filed a notice of intention to appeal to the Supreme Court of the State of Oklahoma (R. 6, 7).

On June 28, 1955 and before any ruling on the notion for rehearing before the Corporation Commission, the appellant herein filed his petition in the Supreme Court of the State of Oklahoma, praying also for a Writ of Prohibition against the Commission from the exercise of its statutory powers (R. 1 to 15).

Under date of March 27, 1956 the Supreme Court of the State of Oklahoma rendered its opinion on the appeal (R. 77 to 91).

On April 11, 1956 the appellant herein filed his petition for the rehearing of said cause, which was denied under date of May 2, 1956, the court rendering a supplemental opinion and under date of February 27, 1957, the original opinion and supplemental opinion on rehearing were withdrawn and a substitute opinion adopted (R. 99

to 115). To this judgment the appellant herein filed a petition for rehearing (R. 117 to 122), which was denied under date of July 2, 1958 (R. 123).

From the final judgment of the Supreme Court of the State of Oklahoma the appellant seeks to perfect this appeal on the sole ground that the statute under which the Corporation Commission of the State of Oklahoma sought to provide for the orderly development of the lands in question, prevent waste, and protect the correlative rights of the parties in interest, as activated by the subject Commission order, is violative of Amendment XIV, Section 1, of the Constitution of the United States, in that it would deprive the appellant of his property and liberty without due process of law.

I

The appeal does not present a substantial Federal question.

"As a general rule, the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned."

16 C. J. S., Sec. 93, p. 306.

"Where a state court of last resort had upheld constitutionality of act, it would be assumed that act was constitutional on all grounds."

Grayson-Robinson Stores, Inc., v. *Lionel Corporation*, 104 A. 2d 304, 348 U. S. 859.

Statutes are presumed to be valid and constitutional and this presumption is particularly applicable to an exercise of the police power.

The issue presented in this case questions the authority of a regulatory body of the State of Oklahoma (the Corporation Commission) to regulate the drilling of a well for oil and gas into a common source of supply. Under the cases hereinafter cited, such regulation is a matter exclusively within the province of the police power of the several states.

The Corporation Commission of the State of Oklahoma was created by Article 9, Sec. 15 of the Constitution. Its powers and duties are set out in the Constitution with a further provision in Article 9, Sec. 35, that the Legislature might from time to time alter, amend, revise, or repeal the sections. It is by the Constitution given the "powers and authority of a Court of Record" (Art. IX, Sec. 19).

Twenty-one states and Alaska have passed statutes authorizing the conservation regulatory authority to regulate the spacing of wells, to establish drilling units, and to require the pooling of tracts within such units.

Alabama	The Acts of 1945 Sec. 179 (32) (c) (12)
Arizona	The Laws of 1951, Ch. 123 Sec. 17
Arkansas	Acts of 1939, No. 105, Sec. 15, p. 219
Colorado	Rev. Stat. 1953, 100-6-4
Florida	Fla. Stats. Ann. 337-22, 337-25, 337-26, 337-27, 337-28, 337-29

Georgia	Ga. Code Ann., S. 43-713 L, S 43-716, S 43-717
Illinois	Laws of 1951, Ch. 104, S 83
Indiana	Burns' Ind. Ann. Stat. 1953, Tit. 46-1714
Louisiana	Louisiana Stats. Ann. R. C. 30: 4C (3), 9ABCD
Michigan	Comp. Laws 1948, Tit. 319.6 (j) 319.13, 319.70
Mississippi	1942 Code Ann., Laws of 1956, Ch. 163, Sec. 1
Montana	Laws 1953, Ch. 238, Tit. 4C (2), 6, 7, 8
Nevada	Laws 1953, Ch. 202, Sec. 6
New Mexico	Stats. 1953, Sec. 65-3-11
North Carolina	Stats. 113-393a
N. Dakota	Laws 1953, Ch. 227, Tit. 5, 2c, 8, 9, 10, 11
Oklahoma	52 Okla. Stats. Ann. Tit. 87.1, 286.16
S. Dakota	SD Code, 42.706 (3) (o) (Laws 1953, Ch. 220, Sec. 1)
Utah	Utah Code Ann. 1953, Laws of 1955, Ch. 65, Sec. 8
Washington	Laws, 1951, Ch. 146, Tit. 19 (1), 22, 23, 24, 25, 26, 27
Wyoming	Wyoming Comp. Stats. 1945 Laws of 1951, Ch. 94, Sec. 3 (Appearing in 1957 Suppl.)
Alaska	Laws 1955, Ch. 40, Sec. 6, 1-5, inc.

All courts which have passed on these statutes, providing for compulsory pooling have held such laws to be free of constitutional objections. Thus far, these cases have reached the courts chiefly from Louisiana, Mississippi and Oklahoma.

The Louisiana statute was approved by the Supreme Court of that State in *Hunter Company* v. *McHugh*, 202 La. 97, 11 So. 2d 495, appeal dismissed 320 U. S. 222. This holding approved in *Chrichton* v. *Lee*, 25 So. 2d 229.

The Oklahoma Statutes have been approved in *Patterson* v. *Stanolind Oil and Gas Co.*, 77 P. 2d 83, 305 U. S. 376, and *Croxton* v. *State*, 97 P. 2d 11 (1935 Act); *Wood Oil Company* v. *Corporation Commission*, 239 P. 2d 1023 and 268 P. 2d 878 (1945 Act); *Anderson Prichard Oil Corporation* v. *Corporation Commission*, 241 P. 2d 363, approving *Patterson* v. *Stanolind Oil and Gas Co., supra;* and, *Superior Oil Company* v. *Corporation Commission*, 242 P. 2d 454; *Panhandle Eastern Pipe Line Co.* v. *Corporation Commission of Oklahoma*, 285 P. 2d 847; *Wakefield* v. *State of Oklahoma*, 306 P. 2d 305, and the case at bar. In the last four cases, the Oklahoma Supreme Court approved the constitutionality of the statute in question. The act has been held constitutional by the Court of Appeals (10th Circuit) in *Panhandle Eastern Pipe Line Co.* v. *Isaacson*, 255 Fed. 2d 669.

The Mississippi statute has been approved by the Supreme Court of Mississippi in a number of cases beginning in 1952 involving the validity of compulsory pooling: *Green* v. *Superior Oil Co.*, 59 So. 2d 100; *Hutchins* v. *Humble Oil & Ref. Co.*, 59 So. 2d 103; *Superior Oil Co.* v. *Foote*, 59 So. 2d 85; *Superior Oil Co.* v. *Griffith*, 59 So. 2d 104; *Superior Oil Co.* v. *Morgan*, 59 So. 2d 105; *Superior Oil Co.* v. *Berry*, 64 So. 2d 357. In *Superior Oil Co.* v. *Foote, supra*, the court said:

> "Hence it is said that all contracts and property rights are subject to a reasonable exercise of the police power. The decisions from other states which have passed on compulsory pooling statutes have consistently applied these principles in holding that such a statute is within the police power of the state, in order to prevent waste, to conserve natural resources, and to protect correlative rights of the owners in a common source of supply."

In *Superior Oil Co.* v. *Foote, supra*, the court held:

> "That an attribute of sovereignty, such as the police power of the state, to conserve its natural resources needs no constitutional sanction for its valid exercise, since it is a power inherent in the existence of a government."

When two or more separately owned tracts are embraced within an established drilling unit, the owners thereof may agree to pool their interests and develop their tract as a drilling unit. If such owners do not thus agree, the Conservation Agency *may* require them to do so. In Alabama, Arkansas, Florida, Illinois, North Carolina, North Dakota and Oklahoma, this word is "shall."

There is uniform authority that a compulsory unitization may be effected to protect the correlative rights of the mineral owners.

Thompson v. *Consolidated Gas Co.*, 300 U. S. 55;
Bandini Petroleum Co. v. *Superior Ct.*, 284 U. S. 8;
Oxford Oil Co. v. *Atlantic Oil Producing Co.*, 22 F. 2d 597, 277 U. S. 585, and
Walls v. *Midland Carbon Co.*, 254 U. S. 300.

In many of the cases the courts have specifically held that there was no taking of property without due process of law, impairment of the obligation of contracts, interference with interstate commerce, or unconstitutional delegation of legislative power.

Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 10;
Walls v. *Midland Carbon Co., supra;*
Danciger Oil & Ref. Co. v. *Railroad Commission*, 49 S. W. 2d 837;
Oxford Oil Co. v. *Atlantic Oil Producing Co., supra;*
Ohio Oil Co. v. *Indiana*, 177 U. S. 190;
People v. *Associated Oil*, 211 Cal. 93, 294 P. 717;
Bandina Petroleum Co. v. *Superior Court, supra.*

The pertinent parts of the order of the Corporation Commission to which the appellant takes exception are as follows:

"IT IS FURTHER ORDERED that the Respondent, W. E. Anderson, be and he is hereby authorized

and permitted to participate in the working interest in said well by paying his proportionate share of the cost of drilling and completion thereof and to receive his proportionate share of the working interest therein.

"IT IS FURTHER ORDERED that in the event the said W. E. Anderson does not desire to participate in said well, that he have the option of taking a lease bonus of $800.00 per acre for the acreage owned by him in the N½ of the SW¼ of said Section 18.

"IT IS FURTHER ORDERED that the said W. E. Anderson shall have thirty (30) days from the date of this order within which to make an election as to which alternative he desires to accept, and that in the event he does not make such election, it will then be presumed that he has elected to take the said $800.00 per acre bonus for the acreage owned by him underlying said tract.

"IT IS FURTHER ORDERED that in the event the respondent elects to participate in the working interest in said well and there is a dispute as to the cost of the drilling and completion thereof, the Commission herein specifically reserves jurisdiction to determine said costs."

In the final opinion of the Supreme Court of the State of Oklahoma (R. 114-115) the court points out that the only thing appellant was required to do by reason of the order of the Corporation Commission was to elect within thirty (30) days from the final order of the Commission whether he would participate in the drilling and operation of the well, or whether he would sell his leasehold rights (in the horizon to be developed) for the consideration fixed by the Commission.

Until such time as the appellant elected to participate there was no necessity for making provision for the execution of a bond to guarantee performance by appellee. (NOTE: At the time this issue concerning the performance bond was first raised in the Supreme Court of Oklahoma the well had already been drilled and was on production.)

The impact of the spacing law is directed at a common source of supply of oil and gas which, by the Act, [Title 52 O. S. A. Section 861, sub-division (c)], is defined as a common accumulation of oil and gas separated from all other such accumulations. All references in the Act to the drilling of wells likewise relate to the common source of supply involved, and all pooling orders predicated on a prior spacing order are likewise limited to the common source of supply involved.

Since the Act also separates the mineral interest into a one-eighth free royalty and a seven-eighths working interest, it follows that any order determining that a non-participating lessee is entitled to a lease bonus does not actually contemplate the execution of a written instrument or a contract between the parties. The accomplishment is that, as to the common source of supply involved, the non-participating lessee will receive a bonus or a fixed sum as the worth of this forgiven right to participate in the development.

In order that this Court may properly have before it the Oklahoma spacing law, it is set forth in full as an appendix to this motion.

The appellant had his "day in court" at all stages of the proceedings in which the Corporation Commission and the Supreme Court of Oklahoma were attempting to determine the correlative rights of the parties, and should not be here heard to complain that the court authorized appellee to drill the well in question and gave appellant thirty days to decide whether to participate in the drilling (as all the other mineral lessees had already voluntarily agreed to do) or to accept a prescribed bonus for a lease as to his mineral interest in the subject matter of the pooling order; that is, the participation rights in the spaced common source of supply (the Bromide sand) underlying the pooled unit.

This case does not involve any question as to the reasonableness of the order in question, but is directed solely to the authority of the Commission under the Statute to make the order.

What should be here pointed out is that a property right is not absolute.

> "In Oklahoma, as generally elsewhere, landowners do not have absolute title to the gas and oil that may permeate below the surface. These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession, including that coming from the lands belonging to others, but the right to take and thus acquire ownership is subject to the reasonable exertion of the power

of the state to prevent unnecessary loss, destruction, or waste."

Champlin Refining Co. v. *Corporation Commission*, 286 U. S. 210.

That a state may, in the interest of conservation, lawfully limit the number of wells to be drilled is beyond question. But as a corrolary to so limiting the number of wells within a given area, and to make constitutional such limitation, a procedure must be provided whereby all of the owners of minerals within such a unit may properly share both the cost and the recoveries. In the instant case, after the spacing order was entered either Anderson or Ellison could have drilled a well, but both could not. Ellison elected to drill, and to protect Anderson's rights, the Oklahoma Corporation Commission gave Anderson time within which to elect whether he desired to participate or to accept a bonus in lieu of his right to separately develop the spaced Bromide sand horizon.

To finalize the matter, the order further directed that if appellant did not elect to participate in the drilling or to accept the lease bonus fixed by the Commission for his lease, "it would be presumed that he has elected to take the bonus."

It has been held that Boards of Adjustment created under the Oklahoma Statutes with power to regulate property uses within a municipality may create drilling units for the production of oil and gas and, although not ex-

pressly authorized to do so, may, in granting a permit to drill a well, fix the amount of lease bonus for those mineral owners not participating in the drilling of the well, or may require a deposit or a bond for the payment of any owner's proportionate part of the drilling and equipping a well upon the unit so created. This difference must be noted. The peace, health and safety branch of the police power, under which Boards of Adjustment acted, operated only on well limitations and not on productive horizons, so in fixing lease bonuses the Board was not limiting the rights acquired by the permittee to one horizon only. See *Amis* v. *Bryan Petroleum Corporation*, 185 Okl. 206, 90 P. 2d 936. The Corporation Commission's power springs from the right to prevent waste and protect correlative rights. But under both, the authorized tribunal must resolve the rights of all interested parties to drill, operate, pay for and share in the permitted well. In the *Amis* case the alternatives granted the non-consenting owners were the same as in the instant case. The court recited such rights to be:

> "The permit as issued fixed certain conditions in the nature of bonuses and royalties to be paid those lot owners who had not joined in the lease upon their execution to respondent of a standard oil and gas lease upon their respective lots. The board also fixed the percentage of royalty to be paid to such owners. There was the further condition that said lot owners might, in lieu of bonuses, participate in the working interest in the well to the extent of their proportionate part of the area by posting bond in a certain sum guaran-

> teeing to respondent payment of their portion of the expense of drilling, granting to the owners the right to elect within ten days after prescribed notice whether to accept the bonuses or to post bond and participate in the working interest as aforesaid."

Appellants therein contended that the drilling lessee should have been required to take appellant's share of the production in payment of appellant's share of the development costs and that the provided election should not have been forced on them. The court said:

> "So far as the production of oil and gas within the city limits is concerned, the ordinance is clearly within the powers delegated by the statute. The statute authorizes the board of adjustment to see that substantial justice is done among the parties. The ordinance recognizes that power in the board, and has proceeded to apply it in cases of oil and gas production, authorizing said board to enter such orders as will be equitable and just. Substantial justice as applied and used in this instance would require an adjudication of the legal and equitable rights of all parties whose property is affected by the city ordinance so far as those rights pertain to the oil and gas beneath the block. It would include an equitable allocation of the production to each unit of ownership, the determination of the lease value and the fixing of the bonus therefor to which each non-leasing owner is entitled, and the percentage of royalties. Those powers are judicial, and the board's order determining those matters is to that extent an adjudication."

It was held in *Anderson-Prichard Oil Corp.* v. *Corporation Commission*, 205 Okl. 672, 241 P. 2d 363, that the conservation statute relating to a division of production between owners and the protection of correlative

rights did not violate constitutional provisions nor is such legislation a taking of property without compensation. In the body of the opinion it is said:

> "In *Russell* v. *Walker*, 160 Okl. 115, 15 P. 2d 114, 115, this Court said in the first syllabus: 'Under the police power of the state, the Legislature may regulate and restrict the use and enjoyment of landowners of the natural resources of the state, such as oil and gas, so as to protect them from waste, and prevent the infringment of the rights of others. Such legislation does not infringe the constitutional inhibitions against taking of property without due process of law, denial of the equal protection of the laws, or taking property without just compensation.'
>
> "In 2 Constitutional Limitations (8th Ed.), pages 1319-1320, it is said: 'The legislature may also regulate and restrict the use and enjoyment of landowners of the natural resources of the state such as subterranean waters, gas, oil, and timber, so as to protect them from waste and prevent the infringement of the rights of others. *Such legislation does not infringe the constitutional inhibitions against the taking of property without due process of law, denial of equal protection of the laws, or taking property without just compensation*'." (Emphasis supplied.)

A later consideration of the statute involved in the case at bar and a Corporation Commission order entered pursuant thereto, appears in the appeal of *Panhandle Eastern Pipe Line Co.* v. *Corporation Commission*, 285 P. 2d 847, where the court said:

> "The key to the cause of Pan-East's complaint concerning the well-spacing order is the Order's paragraph 8, which contemplates subsequent determinations, as provided by Tit. 52 O. S. 1941 and 1951, Sec.

87.1 (d), such as were announced by the Commission in the two 'pooling' orders (Nos. 28332 and 28333, *supra*); that said Company must share in the same proportion, its working interest in, and 7/8ths part of the production from, said well in Section 31 with Carter, Embry Kay and Leon J. Caine, and, likewise the working interest and such share of production from its Clapp well in Section 25, with the owners of the other three-fourths of that unit, which are Huber and Sohio."

There was further complaint about the formula of participation established. This Court said:

"* * * Such a formula of participation is a reasonable and logical one (if perhaps not the most complete or accurate one that may be used when more sub-surface information becomes available) and the orders in this case, like the well-spacing Act, therefore cannot be said to be invalid or unconstitutional on the ground that said formula bears no reasonable relation to the purpose of protecting correlative rights—a *purpose which is no longer open to dispute as a constitutional ground* for the exercise of the State's police power. See *Patterson* v. *Stanolind Oil & Gas Co.*, 182 Okl. 155, 77 P. 2d 83, appeal dismissed 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231, and the discussion in connection with its citation in *Wood Oil Co.* v. *Corporation Commission*, 268 P. 2d 878, 884. Appellants also quote expressions from our opinion in *Application of Peppers Refining Co.*, Okl., 272 P. 2d 416, concerning the importance of protecting correlative rights over securing to some owners maximum drilling and productive profits. Those expressions do not strengthen appellants' position here, for the Commission, by its orders, has in effect, determined that their correlative rights will not be violated by the well-spacing and pooling therein directed, and, as we have seen, appellants have failed to discharge their

burden of establishing that such determination is not sufficiently supported by the evidence. See *Grison Oil Corp.* v. *Corporation Commission*, 186 Okl. 548, 99 P. 2d 134. In the *Peppers Refining Co.* case, we determined that the appellants discharged that burden at least insofar as applicable to one of the leases involved" (Emphasis supplied).

The Unitization Act, 52 O. S. A., Section 286.1-287.15, is closely related to the provisions of the act under consideration in this appeal. It involves a more far reaching adjustment of individual rights in the development of oil and gas reservoirs. Separate rights throughout a reservoir are eliminated and in their stead each owner is given a right, by paying, to share in the production of the whole. If he does not pay he loses his participating right through a foreclosure. The same reasoning as to the validity of the unit action applies as to the validity of the spacing act. The courts have consistently upheld the constitutionality of the Unitization Act. See *Palmer Oil Corp.* v. *Phillips Petroleum Co.*, 231 P. 2d 997. Appeal dismissed, 72 Supreme Court 842, 343 U. S. 390; *Spears* v. *Magnolia Petroleum Company*, 244 P. 2d 843, and *Spears* v. *Magnolia Petroleum Company*, 244 P. 2d 850, and *Spears* v. *Magnolia Petroleum Co.*, 244 P. 2d 852; *Woody* v. *Corporation Commission*, 265 P. 2d 1102.

The appellant's argument to the effect that Anderson, if compelled to put up his share of the cost or take a lease bonus, is being unconstitutionally deprived of his

property for the benefit of Ellison overlooks the basic purposes of a spacing law, and overlooks the following legislative mandate:

> "All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas."
>
> Title 52 O. S. A., 87.1, Sub-paragraph (d).

The questioned statute was held constitutional by the Supreme Court of the State of Oklahoma, *Wakefield* v. *State*, 306 P. 2d 305. Because this case is so nearly parallel to the case before the Court, we desire to call it especially to the Court's attention. Herein, the Texas Company filed an application before the Corporation Commission for an order pooling the individual mineral estates in the drilling unit involved, and after notice and hearing, the Corporation Commission entered an order as follows:

> "'1. That The Texas Company be and it is hereby authorized to drill and produce a well for the production of natural gas from the Morrow Sands common source of supply in the drilling and spacing unit described as Section 27, Township 5 North, Range 25 East, in Beaver County, Oklahoma, and take the full allowable of production therefrom.
>
> "'2. That all persons owning leasehold interests within said spacing unit shall have the right to participate in the cost of drilling of said well and in the production therefrom upon the payment by them of their proportionate share of the cost of the completion of said well and the sum of $107,000.00 is hereby fixed as the cost of said well.

"'3. That in the event there is a dispute as to said cost after drilling and completion thereof, the Commission reserves jurisdiction for the purpose of determining said cost.

"'4. That those parties who do not desire to participate in said well shall have the option of accepting $25.00 per acre as mineral compensation or bonus for their lease, and unless said parties make an election within 10 days from the date of this order to participate in the working interest in said well, then it will be presumed that they have elected to accept the bonus of $25.00 per acre fixed herein'."

One of the mineral owners, Wakefield, objected to the validity of the order on the grounds that it created "enforced tenancy in common, that the financial consideration to the parties was considered as an element determining the issues and that the constitutional rights of the complainant were thereby violated." The Supreme Court sustained the order of the Commission and cited with approval the case of *Superior Oil Company* v. *Oklahoma Corporation Commission*, 242 P. 2d 454, wherein the court held:

"* * * The Corporation Commission has a wide discretion in the performance of its statutory duties. We cannot substitute our judgment on disputed questions of fact unless the findings of the commission are not as commanded by the Constitution, supported by the law, and substantial evidence.

* * * * * * * * *

"In cases coming before us, we find that the commissions' orders have been in the alternative, that is, to make a cash deposit or submit an approved bond to secure the operator in his costs in the drilling op-

erations. *Amis* v. *Bryan Petroleum Corp.*, 185 Okl. 206, 90 P. 2d 936; *Denver Producing & Refining Co.* v. *State*, 199 Okl. 60, 182 P. 2d 503."

The next expression of the Supreme Court of the State of Oklahoma as to the constitutionality of the statute in question is in *Application of Gulf Oil Corporation*, 313 P. 2d 1101, wherein it is recited that:

> "The Corporation Commission has a wide discretion in the performance of its statutory duties and reviewing court may not substitute its judgment on disputed questions of fact for that of the commission, unless the findings of commission are not supported by the law and substantial evidence, 52 O. S. 1951, Sec. 87.1 (d); O. S. 1951 Const., Art. 9, Sec. 20."

The appellee and the other lessees who had agreed to participate in the drilling of a well on the unit had an obligation under their leases to drill the well since production had been obtained on the adjoining unit. All of the mineral owners, including the appellant, were entitled to have their correlative rights protected by the drilling of the well in question.

We should observe finally that the Corporation Commission of the State of Oklahoma, charged with the regulation of the oil industry, has approved hundreds of identical pooling orders, giving the non-assenting party a choice of two options, i. e., to participate in the well, or to accept a bonus. If this procedure was not supplied to the pooling statute, the creation of a drilling and spacing unit into which, under the laws, only one well might be drilled

would be meaningless, because any non-assenting party for any reason might block the drilling of a well to the detriment of the interests of all the other parties owning either minerals or leasehold estates within the unit. As we have heretofore pointed out, the rights of an individual owner of minerals or leasehold within the unit, must, under the conservation statutes and the protection of correlative rights of the other parties, be in some instances subordinate to the right of the regulatory authority to control an orderly development.

The foregoing is a general answer to appellant's contention that his constitutional rights have been violated. There is a more specific answer to his contentions.

Restated, his basic contention is that by the application of this "new fangled" conservation law he has been deprived of "common law" rights which existed between mineral cotenants. The sophistry of this argument is the assumption that appellant and appellee are mineral cotenants. In fact they are not. Anderson owns minerals under the Northwest Quarter of Southwest Quarter. The well was drilled upon the Northeast Quarter of Southwest Quarter (Tr. page 17). Anderson owns no minerals under the tract on which the well was drilled. The relationship between the appellant and appellee is a legally created set of co-equal rights which only superficially resemble the rights of cotenants. Anderson would have no rights in the well or the production therefrom except for the spac-

ing law and the pooling order. Anderson's complaint is that the law which created his rights imposed restrictions thereon which are unpalatable to him. The legally created relationship, or rights, which are not those of cotenancy, may be conferred with such limitations as the authors deem necessary to properly distribute the benefits thereof.

Amis v. *Bryan Petroleum Co.*, 185 Okl. 206, 90 P. 2d 936.

But assuming, without conceding, that Anderson is correct in his assumption that the relationship created by the pooling order is the equivalent of a "common law" mineral cotenancy, in that relationship he would have a right to join in the payment of the development costs and fully participate from first production. That right he had under the pooling order, but refused to avail himself of it. Having refused to participate, as a common law co-tenant, all of Anderson's share of the production would belong to Ellison until all of Anderson's share of the cost of drilling, completing, equipping and operating the well had been recovered from the sale of such share of the production.

Gypsy Oil Co. v. *Marsh*, 121 Okl. 135, 248 P. 329.

Anderson would not during such time receive a one-eighth free of cost, as a royalty. During such time, as a mineral—not a lease-owner, he would receive nothing. Under the pooling order, which permits him to share in

a well drilled by another on such other's land, he receives from first production a proportionate one-eighth as a royalty, free and clear, and the sum of $800.00 for each mineral acre owned as compensation, not for the loss of right of participation—he had that right, but did not choose to go—but as compensation for the fact that the creating law did not confer upon him a right to participate in the seven-eighths leasehold production without paying his share of the cost.

We say the law, the conferring law, the additional rights conferred, all treat Anderson fairly—more than fairly. He cannot urge that his constitutional rights are violated because more rights were not conferred upon him.

II

The judgment rests on an adequate non-Federal basis.

An elementary observation on statutory construction appears to be in order. This Court approved in *Palmer Oil Corporation* v. *Phillips Petroleum Co.*, 343 U. S. 390, the proposition that:

> "The Legislature is itself the judge of the conditions which warrant legislative enactments, and they are only to be set aside when they involve such palpable abuse of power and lack of reasonableness to accomplish a lawful end that they may be said to be merely arbitrary, capricious, and unreasonable, and hence irreconcilable with the conception of due process of law."

This case, as above set out, established the constitutionality of the Unitization Act of Oklahoma (52 O. S. A., Sec. 286.1-286.17).

A reading of the statute questioned in this case leaves clear its meaning. There is no doubt of the intent of the legislature and it made such intent clear by the wording of the statute. The Corporation Commission is authorized by the statute to "*make definite provisions for the payment of cost of development and operation.*" The statute also further empowers the Commission to require a pooling "*upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas.*" "*The owner of such tract*" refers naturally not only to the applicant for the compulsory pooling order but also to any other owner (such as appellant) who does not necessarily desire to drill (Emphasis supplied).

The entire tenor of appellant's brief in support of jurisdictional statement is that the statute in question is unconstitutional because it would *compel* appellant to become a mining co-partner with another or to accept a bonus for a lease on his mineral rights against his will. Reference to the order complained of will demonstrate that appellant has *not been required* to elect either of the alternatives set out by the Commission. Appellee is

bound by any election appellant might make but appellant can accept either alternative or neither of them.

Appellant did not elect either alternative offered by the Commission and upon affirmance of the Commission's order by the Supreme Court of the State of Oklahoma, appellant filed a supersedeas bond (in the sum of $10,000.00) and the enforcement of the mandate in the Corporation Commission has been further stayed pending an appeal to this Court, or until the further orders of the Supreme Court of the State of Oklahoma (R. 132).

This Court, in each of the cases reaching it, questioning the validity of the Oklahoma compulsory pooling statutes, has recognized that such statutes deal with a matter of exclusive state concern and have held that no substantial Federal question is involved.

> *Patterson* v. *Stanolind Oil & Gas Co.*, 77 P. 2d 83, appeal dismissed 305 U. S. 376;
>
> *Palmer Oil Corporation* v. *Phillips Petroleum Co.*, 231 P. 2d 997, appeal dismissed 343 U. S. 390;
>
> *Anderson-Prichard Oil Corporation* v. *Corporation Commission et al.*, 241 P. 2d 363, appeal dismissed 342 U. S. 938.

All of the cases dealing with compulsory pooling and unitization statutes have held them to be within the police power of the State. The history of these cases upholding compulsory pooling attest to an enlightened point of view wherein the valuable property rights of the few are obliged to yield to the public interest.

As early as 1900, this Court, in the case of *Ohio Oil Company* v. *Indiana*, 177 U. S. 190, held that as to gas and oil, a surface proprietor had no absolute right therein until it is reduced to possession; that as to a common source of supply there is a "coequal" right in all the surface owners affected to take production from the common source of supply; and that the use by one such owner of his right to obtain might result in waste or "annihilation of the rights of the remainder." Going further this Court said:

> "Hence it is that the legislative power, from the peculiar nature of the right and objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them, of their privilege to reduce to possession, and to reach the like end by preventing waste."

Finally, the opinion concludes by holding that the Statute with which it was concerned was "but a regulation of the State of Indiana of a subject which especially comes within its lawful authority."

Thus, we submit, that the appeal involved herein does not involve a substantial Federal question and that the judgment of the Supreme Court of the State of Oklahoma appealed from rests on an adequate non-Federal basis and that this Court should deny jurisdiction.

Respectfully submitted,

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JANUARY, 1959.

APPENDIX A

TITLE 52 O. S. A.

Sec. 87.1 COMMON SOURCE OF SUPPLY OF OIL-WELL SPACING AND DRILLING UNITS

Whenever the production from any common source of supply of oil or natural gas in this State can be obtained only under conditions constituting waste or drainage not compensated by counter-drainage, then any person having the right to drill into and produce from such common source of supply may, except as otherwise authorized or in this Act provided, take therefrom only such proportion of the oil or natural gas that may be produced therefrom without waste or without such drainage as the productive capacity of the well or wells of any such person considered with the acreage properly assignable to each such well bears to the total productive capacities of the wells in such common source of supply considered with the acreage properly assignable to each well therein.

ESTABLISHMENT OF UNITS

(a) To prevent or to assist in preventing the various types of waste of oil or gas prohibited by statute, or any of said wastes, or to protect or assist in protecting the correlative rights of interested parties, the Commission, upon a proper application and notice given as hereinafter provided, and after a hearing as provided in said notice, shall

have the power to establish well spacing and drilling units of specified and approximately uniform size and shape covering any common source of supply, or prospective common source of supply, of oil or gas within the State of Oklahoma. Such order establishing well spacing or drilling units for a common source of supply may be entered after a hearing upon the petition of any person owning an interest in the minerals in lands embraced within such common source of supply, or the right to drill a well for oil or gas on the lands embraced within such common source of supply, or on the petition of the Conservation Officer of the State of Oklahoma. When such a petition is filed with the Commission, the Commission shall give at least fifteen (15) days' notice of the hearing to be held upon such petition by one publication at least fifteen (15) days prior to said hearing, in some newspaper of general circulation printed in Oklahoma City, Oklahoma, and by one publication, at least fifteen (15) days prior to the date of said hearing, in some newspaper printed in the county, or in each county, if there be more than one, in which the lands embraced within the application are situated. Except as to the notice of hearing on such a petition, the procedural requirements of Sections 84 to '35, inclusive, of Title 52, Oklahoma Statutes of 1941, shall govern all proceedings and hearing provided for by this section.

ACREAGE OF UNIT—ORDER ESTABLISHING

(b) In establishing a well spacing or drilling unit for a common source of supply thereunder, the acreage to be embraced within each unit and the shape thereof shall be determined by the Commission from the evidence introduced at the hearing, and the following facts, among other things, shall be material:

(1) The lands embraced in the actual or prospective common source of supply (2) the plan of well spacing then being employed or contemplated in said source of supply; (3) the depth at which production from said common source of supply has been or is expected to be found; (4) the nature and character of the producing or prospective producing formation or formations; (5) any other available geological or scientific data pertaining to said actual or prospective source of supply which may be of probative value to said Commission in determining the proper spacing and well drilling unit therefor, with due and relative allowance for the correlative rights and obligations of the producers and royalty owners interested therein.

The order establishing such spacing or drilling units shall set forth: (1) the outside boundaries of the surface area included in such order; (2) the size, form, and shape of the spacing or drilling units so established; (3) the drilling pattern for the area, which shall be uniform; and (4) the location of the permitted well on each such spacing or drilling unit. To such order shall be attached a plat

upon which shall be indicated the foregoing information. Subject to other provisions of this Act, the order establishing such spacing or drilling units shall direct that no more than one (1) well shall thereafter be produced from the common source of supply on any unit so established, and that the well permitted on that unit shall be drilled at the location thereon as prescribed by the Commission, with such exception as may be reasonably necessary where it is shown, upon application, notice and hearing in conformity with the procedural requirements of Sections 84 to 185, inclusive, Title 52, Oklahoma Statutes, 1941, and the Commission finds that any such spacing unit is located on the edge of a pool and adjacent to a producing unit, or for some other reason that to require the drilling of a well at the prescribed location on such spacing unit would be inequitable or unreasonable. Whenever such an exception is granted, the Commission shall adjust the allowable production for said spacing unit and take such other action as may be necessary to protect the rights of interested parties.

DECREASE OF SIZE OF UNITS—ADDITIONAL WELLS—ENLARGEMENT OF AREA—SIZE OF UNITS WHEN OIL WITHIN 9990 FEET OF SURFACE

(c) The Commission shall have jurisdiction upon the filing a proper application therefor, and upon notice given as provided in sub-section (a) above, to decrease the size of the well spacing units or to permit additional wells to

be drilled within the established units, upon proper proof at such hearing that such modification or extension of the order establishing drilling or spacing units will prevent or assist in preventing the various types of waste prohibited by statute, or any of said wastes, or will protect or assist in protecting the correlative rights of persons interested in said common source of supply, or to enlarge the area covered by the spacing order. If such proof discloses that the development or the trend of development indicates that such common source of supply underlies an area not covered by the spacing order. The Commission shall not establish well spacing units of more than forty (40) acres in size covering common sources of supply of oil the top of which lies less than 9990 feet below the surface as determined by the original or discovery well in said common source of supply.

VIOLATION OF ORDER—SEPARATELY OWNED TRACTS OR UNDIVIDED INTERESTS—POOLING COSTS

(d) The drilling of any well or wells into any common source of supply for the purpose of producing oil or gas therefrom, after a spacing order has been entered by the Commission covering such common source of supply, at a location other than that fixed by said order is hereby prohibited. The drilling of any well or wells into a common source of supply, covered by a pending spacing application, at a location other than that approved by a special order of the Commission authorizing the drilling of such

well, is hereby prohibited. The operation of any well drilled in violation of any spacing so entered is also hereby prohibited. When two (2) or more separately owned tracts of land are embraced within an established spacing unit, or where there are undivided interests separately owned, or both such separately owned tracts and undivided interests embraced within such established spacing unit, the owners thereof may validly pool their interests and develop their lands as a unit. Where, however, such owners have not agreed to pool their interests, and where one such separate owner has drilled or proposes to drill a well on said unit to the common source of supply, the Commission, to avoid the drilling of unnecessary wells, or to protect correlative rights, shall, upon a proper application therefor and a hearing thereon, require such owners to pool and develop their lands in the spacing unit as a unit. All orders requiring such pooling shall be made after notice and hearing, and shall be upon such terms and conditions as are just and reasonable and will afford to the owner of such tract in the unit the opportunity to recover or receive without unnecessary expense his just and fair share of the oil and gas. The portion of the production allocated to the owner of each tract or interests included in a well spacing unit formed by a pooling order shall, when produced, be considered as if produced by such owner from the separately owned tract or interest by a well drilled thereon. Such pooling order of the Com-

mission shall make definite provisions for the payment of cost of the development and operation, which shall be limited to the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision. In the event of any dispute relative to such costs, the Commission shall determine the proper costs after due notice to interested parties and a hearing thereon. The operator of such unit, in addition to any other right provided by the pooling order or orders of the Commission, shall have a lien on the mineral leasehold estate or rights owned by the other owners herein and upon their shares of the production from such unit to the extent that costs incurred in the development and operation upon said unit are a charge against such interest by order of the Commission or by operation of law. Such liens shall be separable as to each separate owner within such unit, and shall remain liens until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order. The Commission is specifically authorized to provide that the owner or owners drilling or paying for the drilling, or for the operation of a well for the benefit of all shall be entitled to production from such well which would be received by the owner, or owners, for whose benefit the well was drilled or operated, after payment of royalty, until the owner or owners drilling or operating the well have been paid the amount due under the terms of the pooling order

or order settling such dispute. No part of the production or proceeds accruing to any owner of a separate interest in such unit shall be applied toward payment of any cost properly chargeable to any other interest in said unit.

For the purpose of this Act the owner, or owners, of oil and gas rights in and under an unleased tract of land shall be regarded as a lessee to the extent of a seven-eighths (7/8) interest in and to said rights and a lessor to the extent of the remaining one-eighth (1/8) interest therein. Should the owners of separate tracts or interests embraced within a spacing unit fail to agree upon a pooling of their interests and the drilling of a well on the unit, and should it be established by final, unappealable judgment of a court of competent jurisdiction that the Commission is without authority to require pooling as provided for herein, then subject to all other applicable provisions of this Act, the owner of each tract or interest embraced within a spacing unit may drill on his separately owned tract, and the allowable production therefrom shall be that portion of the allowable for the full spacing unit as the area of such separately owned tract bears to the full spacing unit.

In the event a producing well, or wells, are completed upon a unit where there are, or may thereafter be, two (2) or more separately owned tracts, any royalty owner or group of royalty owners holding the royalty interest under a separately owned tract included in such

spacing unit shall share in the one-eighth (1/8) of all production from the well or wells drilled within the unit, or in the gas well rental provided for in the lease covering such separately owned tract or interest in lieu of the customary fixed royalty, in the proportion that the acreage of their separately owned tract or interest bears to the entire acreage of the unit; provided, where a lease covering any such separately owned tract or interest included within a spacing unit stipulates a royalty in excess of one-eighth (1/8) of the production, or said lease shall be subject to an overriding royalty, to production payment or other obligation, then the lessee of said lease out of his share of the working interests from the well drilled on said unit, shall sustain and pay said excess royalty, overriding royalty, or production payment, and therefrom meet any other obligation due in respect to the separately owned tract or interest held by him. Laws 1947, p. 328, Sec. 1.